



**AOL v JAN (Miscellaneous Application E099 of 2023)  
[2023] KEHC 21796 (KLR) (Family) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E099 OF 2023  
PM NYAUNDI, J  
JULY 28, 2023**

**BETWEEN**

**AOL ..... APPLICANT**

**AND**

**JAN ..... RESPONDENT**

**RULING**

**Introduction**

1. By notice of motion dated May 4, 2023 and presented under order 51 rule 1, order 50 rule 6, order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010, sections 1A, 3A & 79 G of the [Civil Procedure Act](#) the applicant seeks the following orders -
  - i. Spent
  - ii. That this Honourable Court grant leave to the Applicant to file an Appeal out of time of the judgment delivered by the Hon. R. O Mbogo on August 23, 2019 in Nairobi Chief Magistrate's Court case no. 72 of 2018.
  - iii. That this Honourable Court grant leave to adduce additional evidence of appeal (sic)
  - iv. That the costs of this Application be provided for.
2. The application is supported by the 25 paragraph affidavit of the applicant sworn on the April 29, 2023.
3. In the said affidavit the applicant depones that he entered appearance and participated in the matter during trial. That the matter proceeded on August 8, 2019 in the absence of both him and his client. That he was condemned unheard as the court proceeded to deliver Judgment in favour of the



- Respondent on the August 23, 2019. He laments that he was directed to pay school fees for the two children, medical expenses and additional Kshs 450000 monthly to the respondent as maintenance.
4. He contended further that his attempt to review the decision before the trial court was unsuccessful and he only secured some relief when he approached the high court and the quantum of maintenance was reduced to Kshs 25,000 monthly pending the hearing and determination of the pending appeal.
  5. The Applicant avers that the delay is not so inordinate or so great as to be inexcusable and that the additional evidence will enable the court to arrive at a just determination of the matter. He reveals that the additional evidence relates to his current financial status and his ability to meet his parental responsibilities.
  6. In conclusion the applicant submits that the respondent will not be prejudiced if the orders sought are granted.
  7. The respondent opposes the application and has filed grounds of opposition dated June 16, 2023. The Grounds are enumerated below-
    - i. That the application (sic) has inordinately delayed in filing this application
    - ii. That the applicant has not given satisfactory and just reasons for the delay in filing the Application
    - iii. That the application offends section 80 of the *Civil Procedure Act* and order 45 of the Civil procedure Code; and
    - iv. That the application is an abuse of the court process and the Respondent stand to suffer prejudice if the application is allowed.
  8. The parties agreed to canvass the Application via written submissions.

#### **Summary of the applicant's submission**

9. The Appellant identifies 2 issues for determination
  - i. Whether the Applicant should be granted leave to appeal out of time
  - ii. Whether the appellant should be allowed to adduce additional evidence
10. The Applicant relies on the proviso of section 79G of the *Civil Procedure Act*, that grants the court mandate to extend time in deserving cases. The Applicant cites the decision of the Court of Appeal in *Omar Shurie vs Marian Rashe Yafar*<sup>9</sup> Civil Application No. 107 of 2020 which set out the principles to be considered in determining an Application seeking leave to appeal out of time.
11. The Applicant further relies on the decision in *Kamlesh Mansukbalal Damki Patel vs Director of Public Prosecution & 3 Others* [2015] eKLR for the proposition that the Applicant should be allowed his day in Court.
12. The Applicant argues that the matter revolves around his constitutional right to access to justice under article 48 of *the Constitution* of Kenya and his article 50(1) rights to a fair and public hearing.
13. The applicant relies on the decision of the Court of Appeal in *Edith Gichungu Koine vs Stephen Njagi Thoithi* [2014] eKLR and urges that this application should be allowed as the respondent will not suffer prejudice.



14. On the second limb the applicant places relies on the Supreme Court decision in *Mohamed Abdullahi Mohamad & 3 Others* [2018] eKLR that set out the guidelines for admission of additional evidence.

### **Summary of respondent's submission**

15. The issues framed by the Respondent for determination are identical to those framed by the Applicant.
16. On the 1<sup>st</sup> issue it is submitted that judgment that it is intended to appeal against was delivered on 23<sup>rd</sup> August 2019. Whereas section 79G provides that an appeal ought to be filed within 30 days, the Applicant seeks to file his appeal close to 4 years after the judgment was delivered.
17. It is the Respondents position that the Applicant has failed the test laid down by the Supreme Court decision in the case of *Nicholas Kiptoo Arap Salat v Independent Electoral Boundaries Commission & Others* [2014] eKLR.
18. The Respondent further relies on the Court of Appeal decision in *Andrew Kiplagat Chemaringo v Paul Kipkoriri Kibet* [ 2018] eKLR in support of the submission that this application must fail as the Applicant has failed to furnish the court with a satisfactory reason for the delay in presenting his appeal.
19. In addition, the Respondent contends that the Application ought to fail as the Applicant did not attach the intended appeal but only presented a draft and for this relies on the decision in *Evans Kiptoo v Reinhard Omwonyo Omwoyo* [2021]eKLR
20. Finally, it is contended that the Applicant has not laid a sufficient basis to be granted a stay pending appeal as he has not demonstrated that he will suffer substantive loss and that the Application was made without unreasonable delay.
21. On the second limb of appeal the Respondent submits that the Respondent has not discharged his obligation to demonstrate how impactful the new evidence he intends to introduce will be toward the final determination of the matter.
22. The Respondent contends that since the Applicant has not come to court with clean hands as he has failed to comply with the judgment

### **Analysis and determination**

23. Upon reviewing the pleadings, submissions and the relevant law I discern that the issues for determination are
- i. Whether the Court should enlarge time for filing appeal?
  - ii. Whether the Court should allow the Applicant to adduce additional evidence
  - iii. Whether it is in the best interests of the minor children to allow the Application
24. On the first Issue it is common ground that the impugned judgment was delivered on 23<sup>rd</sup> August 2019. This Application for extension is presented on 4<sup>th</sup> May 2023, 3 months shy of 4 years later. The factors to be considered when determining an application for extension of time are found in various court decisions in Kenya. In *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) Mativo JA, stated that the decision whether or not to grant leave is discretionary and proceeded to reiterate that an applicant for extension of time must show good and substantial reasons for the delay and, prima facie good cause why the intended appeal should be heard.



- [6] Whist the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the Court will use its discretion to grant the application
- [7] The discretionary power however, is judicial in nature and must be conformed to the rules of reason and justice.
25. On the delay, the Applicant avers that it was not deliberate nor intentional and that the delay is not so inordinate or so great as to be inexcusable. I have perused the Affidavit of the Appellant and I am unable to find the reason that he gives for the delay.
26. In the decision of Mativo JA cited above he was emphatic that
- ‘[12]...the court must be appraised of all the facts and circumstances related to the delay. The Applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant’s prospects of success.’
27. In the instant case I found that the Applicant has failed this limb of the test. The Applicant seeks to avail himself of Constitutional ammunition stating that unless the Application is allowed he will be denied his access to justice rights. In *National Union of Mineworkers v Council for Mineral Technology* [1988] ZALAC 22 the Court held-
- The Approach is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties.
28. The Respondent minors are also entitled to their Access to justice and fair trial rights which in this case include the right to enjoy the fruits of a judgment, the right to effective, efficient and timeous determination of cases and ensuring that there is an end to litigation. It is therefore not in the best interests of the Child in this matter to grant the prayer s sought.
29. The Applicant having failed the most critical test, I find that the Application fails on the first limb.
30. With regard to the second limb this would only arise for consideration if the Applicant succeeded on the first limb and further can only be considered by the Court that was hearing the Appeal. Even if I were to enlarge time to file appeal, I would not grant leave to adduce additional evidence as the prayer sought can only be granted once the Appeal is filed and it is possible to ascertain the reliefs sought.
- Accordingly, I will dismiss the 2<sup>nd</sup> limb too.
31. The upshot of the foregoing is that the Notice of Motion dated 4<sup>th</sup> May 2023 is dismissed in its entirety.
32. The Applicant to pay costs.

**DATED and DELIVERED at NAIROBI this 28<sup>TH</sup> day of JULY, 2023.**

**P. NYAUNDI**

**JUDGE**

In the presence of:

Mr. Mirito Advocate ..... for the Applicant

Ms Maina h/b for Osiemo..... for the Respondent

Sylvia..... Court Assistant.

